

**COMMENTS ON PROPOSED REVISIONS TO LSC REGULATIONS
PART 1604 – OUTSIDE PRACTICE OF LAW
SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

November 19, 2002

These comments are submitted to the Legal Services Corporation (LSC) by the Center for Law and Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA). On September 11, 2002, LSC, at the direction of the LSC Board, republished in the *Federal Register* (67 FR 57550, September 11, 2002) a Notice of Proposed Rulemaking (NPRM) that had first appeared in the *Federal Register* on January 17, 1995 (60 FR 3367, January 17, 1995), but was never adopted by the LSC Board as a final rule. The latest NPRM again seeks comments on the proposed rule, which were due on November 12, 2002. Because of the timing of the 2002 NLADA Annual Conference, NLADA sought and received an extension on the due date for comments until November 19, 2002.

General Overview of Proposed Revisions

Part 1604 of the LSC Regulations, 45 CFR §1604, was originally adopted in 1976 to implement §1007(a) (4) of the LSC Act that prohibited legal services attorneys from engaging in compensated outside practice of law and restricted them from engaging in uncompensated outside practice of law except as authorized by LSC guidelines. Part 1604 has not been revised since it was promulgated in 1976.

The proposed revisions to Part 1604 that were published for notice and comment in 1995 were the product of a long and thoughtful discussion among representatives of field programs, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), the LSC Board and LSC staff. They effectively addressed a number of issues that had arisen over the years in interpreting Part 1604 and incorporated a number of new ideas that had not been addressed previously. The text of the rule that is included in the recently published NPRM is virtually identical to the proposed rule that was published in 1995, although the introductory information raises several new issues that were not considered in 1995, either because some of the 1996 restrictions are potentially implicated by the proposed rule, or there are other issues that have arisen under the current rule that were not addressed in 1995. Specifically, LSC is seeking comments on the implications for the proposed rule of the 1996 restriction on attorneys' fees, program integrity requirements and timekeeping requirements as well as any other concerns that the proposed rule might raise or are raised under the current rule but not addressed by the NPRM.

The principal substantive thrust of the revisions in the proposed rule is to acknowledge that legal services attorneys, like other members of the profession, have an obligation to engage in *pro bono* legal assistance outside of their work as legal services lawyers and to handle court appointments under appropriate circumstances, and to make it less burdensome and difficult for them to do so. The proposed rule clarifies that in order to meet these obligations it is permissible, within certain limitations, for attorneys who work full-time in legal services programs to use some program time or resources. It also clarifies what outside practice is permissible and what a legal services attorney is expected to do to ensure that his/her outside practice cases are not perceived by the public to be program cases.

NLADA is generally supportive of the revisions proposed in the NPRM and urges LSC to adopt the NPRM as a final rule with a few minor revisions as discussed below.

Section 1604.1 Purpose

The *Purpose* section is revised to set out the framework for changes that appear in the rest of the rule. It provides for a recipient to adopt written policies on outside practice to permit a recipient to enable its program attorneys to engage in *pro bono* legal assistance and court appointments while still meeting their primary obligations to program clients. It includes a new provision that states that the regulation should not be construed to allow recipients to "unduly" restrict the ability of their attorneys to engage in *pro bono* work and court appointments. NLADA supports these revisions to the *Purpose* section and urges LSC to adopt the section without revision.

Section 1604.2 Definitions

The proposed revisions to the *Definitions* section are basically technical in nature, although they do make helpful clarifications in several places. They do not make any substantive changes to the rule. NLADA supports these revisions and urges LSC to adopt them as proposed.

LSC asks for comments with regard to one minor issue related to the definition of "outside practice of law." Several Office of Legal Affairs opinions have concluded that legal services attorneys who serve in the military reserves as JAG Corps officers are not engaged in the outside practice of law while on reserve duty. LSC is seeking comments on whether the rule should include explicit language stating this policy. NLADA does not have any specific view on this issue but has no objection to the inclusion of explicit language.

Section 1604.3 General Policies

This proposed provision would explicitly require recipients to adopt written policies governing the outside practice of law. These policies must be consistent with applicable rules of professional responsibility. No such requirement exists under the current Part 1604 that permits a recipient's executive director to make a determination about whether outside practice is permissible on an *ad hoc* basis. In addition, this section states that a recipient may adopt policies that are more restrictive than required by Part 1604 and may adopt outside practice policies that apply to part-time attorneys, even though the restrictions of Part 1604 apply only to full-time attorneys.

NLADA generally supports the requirement for recipients to adopt written policies governing outside practice. LSC has required written policies to implement many of the more recent regulations, and NLADA believes that the existence of written policies has aided in making the LSC compliance effort less subjective.

While NLADA agrees that a recipient should have the flexibility to design outside practice policies to ensure that its staff is available to provide needed legal assistance to program clients, we are concerned that by suggesting that more restrictive policies are permissible, LSC would encourage recipients to limit outside practice beyond what is necessary and what is consistent with the new language in the *Purpose* Section that indicates the rule should not be interpreted in a manner that unduly restricts the ability of legal services lawyers to do *pro bono* work and court appointments. NLADA is especially concerned about the suggestion that recipients should apply outside practice restrictions to part-time attorneys and urges LSC to eliminate these provisions from the proposed rule.

Section 1604.4 Permissible Outside Practice

This is a new section that combines and revises provisions from other sections of the current rule. It affirmatively states what kinds of activities are permissible outside practice. First, in order for a case or matter to be permissible the executive director (or designee) has to determine that the representation is consistent with the attorneys' responsibilities to the recipient's clients. Second, to protect the recipient from criticism arising from the perception that the recipient is engaged in inappropriate or controversial work, the attorney may not intentionally identify the case or matter with the recipient. Third, the activity must fit into one of the five categories that are listed in the proposed rule which are variations or clarifications of several categories that are found in the current rule.

Those categories are: (1) work by newly employed attorneys who must close cases from a previous practice that must be done on his or her own time; (2) and expansion of the in the current rule that permits work on behalf of a close friend or family member to include work on behalf of the attorney him/herself or another member of the recipient's staff; (3) work on behalf of a religious, community or charitable group, that is identical to the current rule; (4) a

clarification that outside practice on behalf of a client referred by an organized *pro bono* or certain legal referral programs is permissible; and (5) any work that satisfies an obligation to participate in *pro bono* work under applicable rules of professional responsibility, whether such obligation is mandatory or aspirational.

NLADA fully supports these revisions. They clarify several issues that have arisen under the current rule, protect recipients, acknowledge that legal service attorneys are subject to the same *pro bono* obligations as other members of the professions, and make it easier for them to meet those obligations.

Section 1604.5 Compensation

As is true under the current rule, this proposed provision permits a newly hired attorney to receive compensation, including attorneys' fees, for cases from a prior practice. NLADA supports this provision and urges LSC retain it in the revised rule.

This proposed rule would also permit a legal services attorney to seek and accept attorneys' fees as long as the fees are not deducted from the client's recovery of damages or retroactive benefits and the attorney remits those fees to the recipient. It was written before Congress imposed the restriction on legal services programs claiming, collecting and retaining attorneys' fees. In the revised preamble to the NPRM LSC expressed concern that it is no longer consistent with the current regulatory and statutory restrictions and asked for comments on this issue.

While NLADA acknowledges that under the current attorneys' fee restriction, a recipient would be prohibited from retaining any attorneys' fees that an attorney remitted to it as a result of outside practice, we suggest that the rule not be revised to state that explicitly. Rather, NLADA suggests that the provision on attorneys' fees simply be deleted and the text of the rule remain silent with regard to attorneys' fees, as is true under the current rule. The preamble should state that the attorney could seek the fees and return them to the client (other than him/herself), remit them to the organization that provided the referral or donate them to charity.

Section 1604.6 Use of Recipient Resources

This provision was the result of a consensus reached after significant debate and compromise during the debate on the 1995 version of the rule. It speaks to an issue that is not directly addressed in the current rule but has been the subject of some discussion over the years. The proposed rule permits the use of some recipient's resources, including time, for outside practice of law, as long as those resources are not used for prohibited activity.

For compensated cases from a prior practice, a newly employed attorney would be permitted to use only a *de minimis* amount of program time and resources, such as making a brief telephone call or faxing a document, but would have to take leave to make a court appearance. Since the attorney is permitted to receive outside compensation for these cases, NLADA agrees that it is appropriate to limit the amount of program time and resources that can be devoted to them to the minimum that is practicable.

For uncompensated cases, the proposed rule takes a somewhat more expansive view, permitting recipients to allow attorneys to use a *limited* amount of program time and resources to meet their professional responsibilities to their *pro bono* clients, without defining *limited* with any degree of specificity other than to say that if the attorney were to participate in a long trial or extended negotiation, s/he would have to take leave to do so.

LSC specifically requests comments on whether it is appropriate to use recipient funds for any outside practice and whether the distinction between "*de minimis*" and "limited" makes sense and is workable. While NLADA believes that there may be some difficulty in distinguishing between "*de minimis*" and "limited," we are confident that recipients are fully capable of developing policies that do so effectively, and should be permitted to do so. We urge LSC to adopt these provisions on the use of recipient resources.¹

In addition, LSC invites comments on the impact of the program integrity rules and the timekeeping rules on the proposed Part 1604.

NLADA does not believe that the use of a limited amount of recipient resources for unrestricted outside practice as described in the NPRM has any significant implications for the program integrity rules. If a full-time legal services attorney is engaged in unrestricted outside practice on behalf of an individual client or an organization that does not engage in restricted activity, there is no problem with the use of recipient resources under 1610.8, which is inapplicable. If the attorney engages in unrestricted outside practice for an organization that also engages in restricted activities, there is no problem under the program integrity rules as long as the organizations are physically and financially separate and no LSC resources are used to subsidize the restricted activity. If the legal services attorney is engaged in restricted outside practice, under the NPRM the attorney must do it on his/her own time. No LSC funds will be transferred to the

¹ The restriction on outside practice of law is derived from the LSC Act and applies only to LSC and private funds. Because the proposed rule was developed prior to the enactment of the 1996 restrictions, it states that in permitting the attorney to use the recipient's resources for outside practice, LSC and private funds cannot be used for prohibited activities. In view of the 1996 restrictions, we acknowledge that this provision should be expanded to generally include all of a recipient's funds for those restrictions derived from the 1996 appropriations act, except as permitted by that act, even though the outside practice restriction itself applies only to LSC and private funds.

other entity as a result of this outside practice and the general program integrity rules regarding physical and financial separation apply.

LSC also asks about the impact of the LSC Timekeeping rule, Part 1635, on the NPRM. Part 1635 requires that legal services attorneys document all of their compensated time with time records that capture the amount of time spent on all cases, matters and supporting activities.

Clearly, any outside practice that a full-time legal services attorney does on his or her own time outside of regular working hours does not present a problem under the Timekeeping rule because the attorney is not required to account for that time for which s/he is not compensated. In the past, all outside practice was done outside of regular working hours, and NLADA anticipates that even under the new relaxed rule, most will continue to be done outside regular working hours and will not require keeping time.

For those attorneys who are completing compensated practice from a prior practice and use a *de minimis* amount of program time to do so, we believe that there is no need to keep time under Part 1635. In Section 1635.3 (d) of the Timekeeping rule that requires part-time attorneys to certify that they have not engaged in restricted activity on program time or used program resources, there is a discussion regarding *de minimis* actions that states that the certification requirement does not apply to *de minimis* activities. NLADA suggests that this discussion is equally applicable in the outside practice context and that timekeeping would not be required for *de minimis* program time spent on compensated outside practice.

Under Section 1607(b) attorneys are permitted to use program time and resources to engage in court appointments and mandatory *pro bono* cases, and under §1604.7(c) they may identify the recipient as their employer in these cases. Assuming that attorneys do these cases on program time, they would record their time in the same way that they would record time for regular program cases.

The principal outstanding question is whether an attorney must keep time for uncompensated outside practice if the attorney uses "limited" amounts of program time for outside practice that occurs during the regular working day and for which s/he does not take leave, does not make up for with additional time and is compensated. Legal services attorneys typically work more than a normal 40-hour work week, and would not be required to keep time as long as any outside practice was done during the period beyond the normal work week. However, there may be situations where limited outside practice must be done during the normal work day and the attorney cannot work beyond the normal work week to make up for the time. In these situations the attorney would be required either to take leave or to include the outside practice in the time records, and LSC would

need to provide some guidance regarding the appropriate way to account for the time (e.g., as a "case," "matter" or "supporting activity").

NLADA believe that in most instances the timekeeping requirements would not be applicable to outside practice but in those instances where it is, the current timekeeping rule can be interpreted to accommodate the application.

Section 1604.7 Court Appointments

This section expands and clarifies the provisions in the current rule on court appointments, which are different in several respects from those that apply generally to outside practice. In order to protect the recipient against efforts by some judges to unfairly burden recipients by appointing legal services attorneys to handle appointed cases in lieu of members of the private bar, the proposed rule reiterates the provisions of the current rule that requires that court appointments of legal services attorneys be made and compensated on the same basis as private attorneys. As is also true under the current rule, the proposed rule provides that attorneys can receive compensation for court appointments but must remit it to the recipient. Compensation for court appointments is not restricted under the attorneys' fee restriction, so this is not a concern under the NPRM.

The proposed rule now makes it clear that full-time attorneys are permitted to use program time and resources without limitation for permissible court appointments. It also makes it clear that they are permitted to identify the recipient as their employer when they are appearing in a court appointed case.

The final provision of the proposed rule provides that when an attorney is engaged in outside practice to fulfill a mandatory *pro bono* obligation, the attorney may receive compensation (not attorneys' fees) if s/he remits the compensation to the recipient, may use program resources to undertake the representation, and may identify the recipient as his/her employer. We also assume that time spent on court appointments can be recorded as program "cases" for purposes of timekeeping.

NLADA is fully supportive of the provisions on court appointments, although we believe that there are a few technical corrections that need to be made to the rule (e.g., in section (a) a determination must be made by the "director of the recipient." NLADA believes that determination should be made by the "recipient's director or designee" to make it consistent with the practice found in other more recently adopted rules.)

If you have any questions or about the points made in this comment or would like any additional information, please feel free to contact Linda Perle at CLASP (lperle@clasp.org) or by telephone at 202-906-8002. CLASP's address is 1015 15th St., NW, Suite 400, Washington, DC. 20005.